IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 70-93

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

NASH-FINCH COMPANY, d/b/a JACK AND JILL STORES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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INTEREST OF THE AMICUS CURIAE.*

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade associations, with an underlying membership of approximately 5,000,000 business firms and individuals and a direct business membership in excess of 38,000. It is the largest

* This brief is filed with the express written consent of counsel for both Petitioner and Respondent in accordance with Rule 42(2) of the Court.

association of business and professional organizations in the United States.

The National Chamber has appeared as *amicus curiae* before this Court in various matters of concern to its members and which have affected those members significantly in a wide variety of business relationships.[1] The instant case decidedly is within that category.

The underlying problem presented in the instant case is a substantial and recurring one, and one which has immediate and continuing impact on the membership of the National Chamber. It is manifestly important that employers, subjected to the deleterious consequences of unlawful union picketing and boycott activity, violative of state law as well as federal labor laws, should have the widest range of lawful avenues of redress available to them and once the state has acted to enjoin such illegal union conduct, should be permitted to rely on those protections afforded by the state court. It is apparent that a decision by this Court in this case will have a direct and far reaching effect on

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1. While arising in a somewhat different context than that present herein, the National Chamber has demonstrated a continuing interest in seeking a determination by this Court of the manner in which employees can seek and receive protection from the adverse effects of unlawful picketing and boycott activity engaged in by unions. For example, the National Chamber recently filed briefs, *amicus curiae* in *The Los Angeles Herald-Examiner, et al.* v. *Kennedy*, 91 S. Ct. 12 (1970) and *Sears, Roebuck & Co., et al.* v. *Solien, et al.*, ... U. S. ....., 77 LRRM 2403 (No. 1588, October Term, 1970), seeking to define their status in district court proceedings brought by the National Labor Relations Board pursuant to Section 10(1) of the LMRA (29 U. S. C. A. 160(1). Moreover, the issue of the extent to which state court action is available to employers to protect them against the adverse effects of unlawful union activity has been and continues to be of critical importance to employers subjected to this activity. In this regard, it should be noted that the National Chamber filed a brief *amicus curiae* in this Court in the recent case of *Boys Markets, Inc.* v. *Retail Clerk's Union, Local 770*, 398 U. S. 235 (1970).

whether or not those available avenues are preserved.[2] It is in the role of representative of a significant number of employers whose effective functioning and, in some cases, very existence, is often directly threatened by unlawful union activity, that the National Chamber considers it important to present to this Court its views in support of affirmance of the lower court decision in the instant case.

INTRODUCTORY.

In approximately May, 1969, the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (hereinafter referred to as the Union), began picketing at the Respondent's Grand Island, Nebraska facility. During the course of its picketing, the Company alleged that the Union threatened and intimidated Respondent's customers, blocked ingress and egress of the public to and from the picketed premises and engaged in certain other acts, violative of state law. As a consequence of this alleged conduct, and in order to afford protection therefrom to itself, its customers and the general public, on May 27, 1969, the Respondent petitioned the District Court of Hall County, Nebraska for injunctive relief. On May 28, 1969, the State Court issued a restraining order against the Union and, subsequently, upon its determination that the method and

2. In *Boys Markets, supra*, this Court upheld the power of a state court to enjoin a union's strike in violation of a "no-strike" clause in the parties' collective bargaining agreement. Thus, this court established that state courts do, in fact, have a legitimate role to play in resolving labor relations disputes even when the subject matter of those disputes also falls within the ambit of applicable federal law. In so holding, this Court recognized the role to be played by state courts despite their awareness that one result of their decision would be to create "a certain diversity . . . among the state and federal systems in matters of procedural and remedial detail. . . ." 74 LRRM, at 2261. In the instant case, therefore, one of the consequences that would result from adoption of the Board's position would be to substantially detract from the spirit and intent of this Court's determination in *Boys Markets*.

manner of the Union's picketing was in fact, violative of state law, on June 25, 1969, issued a temporary injunction limiting the Union's picketing in certain respects.

At no time did any of the parties to the dispute seek to invoke the jurisdiction of the National Labor Relations Board concerning the picketing or the state court injunction. Nevertheless, the Board on August 29, 1969, *sua sponte* sought to inject itself into the matter by filing a complaint in the United States District Court for the District of Nebraska and on September 5, 1969, by filing a motion for a preliminary injunction seeking to restrain the Respondent herein from enforcing or attempting to enforce portions of the state court injunction.

On September 26, 1969, upon motion of Respondent, the Federal District Court dismissed the Board's complaint on the ground that the District Court did not have jurisdiction due to the limitations of 28 U. S. C. Section 2283 which prohibits a federal district court from granting "an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The District Court held that the Board's action could not be maintained either by application of any of the three expressed exceptions to the statute or by application of the implied exception given the United States when it sues as a party.

The Board thereupon unsuccessfully appealed the adverse decision of the District Court to the United States Court of Appeals for the Eighth Circuit. In its appeal, the Board contended (i) that as a federal agency of the United States it should be considered as if it were the "United States" for the purposes of Section 2283 and, therefore, the prohibition of the statute was not applicable; (ii) that because the state court was wholly without jurisdiction over the subject matter, the federal preemption in the area pre-

cluded applicability of the state; and (iii) that the "as authorized by an Act of Congress" or "in aid of its jurisdiction" exceptions to the statute were applicable.

The Circuit Court rejected the Board's contentions and held that in the absence of a showing of clear Congressional intent to bestow the privileges and immunities of the United States upon administrative agencies the Board was not privy to the exception of Section 2283 afforded the United States. Further, it held that the prohibition of Section 2283 could not be circumvented by the preemption doctrine, even when that doctrine would otherwise be unarguably applicable; and finally, that unless the union's picketing had been made the subject of an unfair labor practice charge and complaint allowing the Board to seek federal district court injunctive relief under either Section 10(j) or 10(l) of the National Labor Relations Act, the specific exceptions of Section 2283 were similarly not applicable.

In its Petition for a Writ of Certiorari to this Court, the Board abandoned its other contentions and relied exclusively on its contention that Section 2283 is not applicable because the National Labor Relations Board as a federal administrative agency is the "United States" for the purpose of Section 2283 and, therefore, that Section does not bar a federal district court, upon application by the Board, from enjoining a state court decree.

ARGUMENT.

The principal question presented for review is whether the prohibitions of the Anti-Injunction Statute (28 U. S. C. 2283) prevent a federal district court, upon petition by the National Labor Relations Board, an agency of the United States Government, from enjoining state court proceedings, when the basis for the Board's action does not fall within any of the statutorily defined exceptions to the statute.

In the instant case, the Board is contending that the clear and unambiguous provisions of the Anti-Injunction Act and the prohibitions expressed therein cannot be applied to the Board. While acknowledging that its position cannot be sustained by application of any of the three legislatively expressed exceptions to the statute's coverage, the Board nevertheless contends that the "governmental exception", judicially created and defined by this Court in *Leiter Minerals, Inc.* v. *United States*,[3] is applicable to the Board as an administrative agency of the United States.

It is the position of the National Chamber that neither legislative history, judicial decision nor this Court's decision in *Leiter* supports the Board's position herein.

I. The Statutory History and Judicial Authority Regarding Section 2283 Evidences No Rationale for Excepting the National Labor Relations Board from the Prohibition Expressed in the Statute.

The antecedents of the present Anti-Injunction Act are ancient. In Section 5, of the Act of March 2, 1793, enacted four years after the passage of the Judiciary Act of 1789,[4] which authorized the removal of state court proceedings to inferior federal courts, Congress enacted the first Anti-Injunction Statute,[5] which provided: "[N]or shall a writ of injunction be granted to stay proceedings in any court of a state . . .". While a literal reading of the statutory language indicates a congressional intent to impose an absolute prohibition on the federal courts to enjoin state proceedings, the absence of any recorded debate concerning Congress' motivations for its initial adoption immediately led to a conflict in the courts. Various theories have been

3. 352 U. S. 220 (1957).
4. Judiciary Act of 1789, Ch. 20, Section 12, 1 Stat. 73.
5. Act of March 2, 1793, Ch. 22, Section 5, 1 Stat. 334-35.

advanced concerning early legislative intent. For example, the original statute has been interpreted as representing an attempt to temper the friction engendered by the interference with state court adjudicative processes resultant from the Judiciary Act of 1789[6]; early congressional anxiety over federal encroachment on state judicial power[7]; and a legislative and congressional aversion to equity jurisdiction in general.[8]

Notwithstanding the multiplicity of theories advanced, it is generally accepted that the Anti-Injunction Acts have been utilized to avoid friction between the federal government and the states resulting from the imposition of federal judicial authority into the orderly functioning of a state's judicial process.[9] This purpose was stated by Mr. Justice Frankfurter in *Hale* v. *Bimco Trading, Inc.*, when he wrote that the Act served as "an historical mechanism . . . for achieving harmony in one phase of our complicated federalism by avoiding needless friction between two systems of courts . . .".[10]

Yet, despite this commonly recognized purpose, the case history of the Anti-Injunction Act reveals that its proscriptions were more honored in their breach than in their adherence by the federal courts which tended to ignore the

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6. See Reaves, *The Federal Anti-Injunction Statute in the Aftermath of Atlantic Coast Line Railroad*, 5 Ga. Law Rev. 294, 295 (1971).

7. See Warren, *Federal and State Court Interference*, 43 Harv. L. Rev. 345, 347 (1930).

8. See *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118, 131-32 (1941).

9. *Oklahoma Packing Co.* v. *Oklahoma Gas and Electric Co.*, 309 U. S. 4, 8-9 (1940).

10. 306 U. S. 375, 378 (1939).

Act's sanctions and continuously carved various judicial exceptions out of the general legislative prohibition.[11]

In response to this judicial emasculation of the purpose and intent of the Anti-Injunction Act, in 1941, this Court, in *Toucey* v. *New York Life Insurance Company*,[12] held that the engrafting of judicial exceptions to the then existing Anti-Injunction Act was unwarranted and in derogation of congressional intent.[13] The philosophy of the majority of the Court in *Toucey*, expressed by Mr. Justice Frankfurter, was that the terms of the Anti-Injunction Act should be applied strictly and against federal power:

> ". . . the purpose and direction underlying the provision is manifest from its terms: proceedings in the state courts should be free from interference by federal injunction. The provision expresses on its face the duty of 'hands off' by the federal courts in the use of the injunction to stay litigation in a state court."

Although the issue before the Court in *Toucey* was narrow—the power of the federal court to stay a proceeding in a state court where the issue before the state court had already been adjudicated in the federal court—broad language utilized by the Court in *Toucey* was interpreted as having eliminated the previously described judicially

11. E.g., *Marshall* v. *Holmes*, 141 U. S. 589 (1891) (multiplicity of actions); *Ex parte Young*, 209 U. S. 123 (1908) (action based on unconstitutional statute); *Julian* v. *Central Trust Co.*, 193 U. S. 93 (1906) (federal court obtained custody of a res in an in rem proceeding); *Local Loan Co.* v. *Hunt*, 292 U. S. 234 (1934) (injunction permitted where state suit would relitigate federal action); *United States* v. *Inaba*, 291 F. 416 (E. D. Wash., 1923) (injunction sought by the United States to protect and enforce a lien on crops it had reserved for payment of rent of leased land which it held as trustee).

12. *Supra*, note 7.

13. Section 265-Judicial Code of 1911, 28 U. S. C. Section 379 (1940) which stated "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

created exceptions and placing the responsibility for fashioning future exceptions to the statute's proscription upon the legislature, rather than upon the judiciary.[14]

In response to the *Toucey* decision and its implicit holding that the Anti-Injunction Act represented an *absolute ban* upon federal courts from enjoining state court proceedings, Congress in 1948, enacted Section 2283 of the Judicial Code, providing therein that:

> "A Court of the United States may not grant an injunction to stay proceedings in a State Court except as authorized by an Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Thus, by revising the Anti-Injunction Statute, Congress afforded the federal courts no latitude in creating exceptions to the statute's application. By creating three separate and specific exceptions, the revisers of the statute stated that:

> "An exception to Acts of Congress relating to bankruptcy was omitted and the general exception substituted to cover *all* exceptions."[15] (Emphasis supplied.)

Congressional intent to construe Section 2283 strictly against federal power was again recognized by this Court when, in *Richman Brothers*, the first significant interpretation of Section 2283 following its enactment, Mr. Justice Frankfurter, speaking for the majority, stated:

> "We need not re-examine the series of decisions, prior to the enactment of Title 28 of the United States Code in 1948, which appeared to recognize implied excep-

14. See, J. Moore and H. Fink, *Judicial Code Pamphlet* 924 (1967); Comment, *Federal Injunctions Against State Actions*, 35 Geo. Wash. L. Rev. 744 (1967). Mr. Justice Frankfurter's decision in *Toucey* gives further support for this proposition when he stated, "The fact that one exception has found its way into section 265 is no justification for making another." 314 U. S. at 139.

15. *Amalgamated Clothing Workers* v. *Richman Bros. Co.*, 348 U. S. 511, 515 (1955).

> tions to the historic prohibition against federal interference with state judicial proceedings. *By that enactment, Congress made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation.*'"[16] (Citations omitted, emphasis supplied.)

The most recent affirmation of this principle occurred on June 8, 1970, in *Atlantic Coast Line Railway Company* v. *Brotherhood of Locomotive Engineers*,[17] when this Court again strictly construed Section 2283 by holding that it is a "binding rule" on the power of the federal courts.

In *Atlantic Coast Line*, the Court considered the propriety of a federal court decision enjoining the enforcement of a state court's injunction against a union's picketing of the railroad's premises.

In holding the federal court injunction improper, this Court reaffirmed two fundamental propositions, both of which are at issue in the instant case. First, in laying to rest the Board's present contention concerning the applicability of the preemption doctrine as a bar to the state court injunction, it held that *the proscription of Section 2283 applies even though the state is wholly without jurisdiction over the subject matter of the dispute.*[18] Moreover, *Atlantic Coast Line* again redefined the role to be played by the federal judiciary in deciding cases arising under Section 2283. In holding that the creation of further exceptions to the section's applicability was exclusively a congressional function, the Court, reaffirming its 1955 holding in *Richman Brothers*, stated:

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16. Id. at 515 (1955).

17. 90 S. Ct. 1739 (1970).

18. In reaffirming this principle, first enunciated in *Richman Brothers*, Mr. Justice Black stated in *Atlantic Coast Line* that

> ". . . a federal court does not have inherent power to ignore the limitations of Section 2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, *even when the interference is unmistakably clear.*" (emphasis supplied) 90 S. Ct. 1739, 1747 (1970).

> "This is not a statute conveying a broad general policy for appropriate *ad hoc* application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions. Since that time (1955), Congress has not seen fit to amend the statute and we therefore adhere to that position and hold that *any injunction against state court proceedings* otherwise proper under general equitable principles *must be based on one of the specific statutory exceptions to Section 2283* if it is to be upheld . . . the exceptions should not be enlarged by loose statutory constructions."[19] (Citations omitted, emphasis supplied.)

It is in the context of this clear and continuous recognition by the Congress and the courts of the necessity to preserve the basic constitutional concept of a state judicial system free from federal court interference that the Board, while acknowledging that its action herein cannot find favor by virtue of application of any of the expressed exceptions to Section 2283, nevertheless contends that it should be insulated from the effect of the statute's proscription and be permitted to set aside a state court's decision when that decision is contrary to that which the Board considers a proper resolution of a labor controversy. In support of this position, the Board is contending that it is, for purposes of Section 2283, the United States Government and, therefore, a total exemption from the Section is applicable to it.[20]

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19. Id., at 1743 (1970).

20. In support of its position, the Board relies on *N. L. R. B.* v. *Roywood Corp.*, 429 F. 2d 964 (C. A. 5, 1970) wherein the United States Court of Appeals for the Fifth Circuit concluded that the "governmental exception" to the prohibition of Section 2283 is applicable to the Board. In so holding, the court reversed a decision of the Federal District Court which had held that the Board's action seeking to enjoin the employer from enforcing a state court injunction could not be maintained, because the Board's jurisdiction had not been invoked and also because the Anti-Injunction Statute was a bar to the action (302 F. Supp. 167).

In reversing the lower court's decision, the Fifth Circuit found that (1) the jurisdiction of the Board had, in fact, been invoked; (2) notwithstanding the prohibition of Section 2283, the federal

II. The "United States as a Party" Exception Is Not Applicable to the Board.

Despite the fact that this Court had held that the Board, as an administrative agency, is a creation of and not the legal equivalent of the United States, and hence not privy to all the privileges and immunities bestowed on the

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preemption in the area of labor law constituted a bar to the state court decree; and (3) the Board as an administrative agency of the Government was privy to the implied exception to Section 2283 given the United States when it sues as a party.

In addressing itself to the preemption question, however, the court ignored the clear and unambiguous holding of Mr. Justice Black in *Atlantic Coast Line* that the preemption doctrine could not be applied as a means to circumvent the prohibition of Section 2283 (See footnote 18, and accompanying text, *supra*).

Moreover, the remainder of the court's discussion primarily focused on the invocation of the Board's jurisdiction pursuant to the employer's filing of unfair labor practice charges. While not stating so directly, this discussion established an arguable basis upon which the district court could have sustained the Board's action by application of the "in aid of its jurisdiction" exception to Section 2283. For in the event of a breach of the settlement agreement the Board is empowered to set aside the agreement and thereupon, pursuant to the dictates of Section 10(1) of the Act (29 U. S. C., Sec. 160(1)) is compelled to file a petition with the district court seeking to enjoin the union's unlawful activity. Therefore, if the state court decree were permitted to stand, then the district court would have been subjected to precisely that kind of restraint of its jurisdiction which this Court, in *Capital Service, Inc.* v. *N. L. R. B.*, 347 U. S. 501 (1954), sought to avoid.

> "... the Federal District Court would be limited in the action it might take. If the Federal District Court were to have unfettered power to decide for or against the union, and to write such decree as it deemed necessary in order to effectuate the policies of the Act, it must be freed of all restraints from the other tribunal. To exercise its jurisdiction freely and fully, it must first remove the state decree. When it did so, it acted 'where necessary in aid of its jurisdiction' ". 347 U. S. 505-506.

Yet, despite this substantial discussion concerning the Board's jurisdiction, the Circuit Court did not base its decision on this rationale. Rather, it held in a conclusionary manner and without any discussion of the reasons for its conclusion, that the Board, as an administrative agency of the Government was entitled to the governmental exception granted the United States as a party.

sovereign,[21] the Board is asserting a contrary position in attempting to successfully maintain this action.

In addition to the three statutorily sanctioned exceptions to the statute, in 1957, this Court, in *Leiter,* sculptured one additional exception to the prohibition of Section 2283. It held that the Section's proscription could not be applied to the United States. In so deciding, the Court did not, however, abandon its prior decisions severly restricting the federal courts from emasculating the provisions of the Section. While the decision in *Leiter* evidenced a hesitancy to create a new exception to the clear language of the statute,[22] the Court nevertheless felt that the threat of "irreparable injury to a national interest" and the "frustration of superior federal interests" which would result from precluding the United States as a plaintiff from obtaining a stay of state court proceedings warranted a narrow expansion of the exceptions to the Section's application.

In the decision below, the court, in holding that ". . . for the purpose of Section 2283 applicability, the National Labor Relations Board is an administrative agency of the United States, and is not the United States" and that, therefore, the prohibition of "Section 2283 is applicable to the National Labor Relations Board"[23] recognized that it was not the intention of this Court in *Leiter* to reopen the

21. *Nathanson* v. *National Labor Relations Board,* 344 U. S. 25 (1952) held that a decision of the Board requiring an employer to make employees whole for back wages lost as a result of its discriminatory activity in violation of the Act constituted a valid debt owed the Board. However, contrary to the Board's contention, the Court held further that this debt was not entitled to preference under federal bankruptcy laws as would be a debt directly owed the United States.

22. "It is always difficult to feel confident about construing an ambiguous statute when the aids to construction are so meager . . ." 352 U. S. 220, 226 (1957).

23. *N. L. R. B.* v. *Nash-Finch Company,* 434 F. 2d 971 (C. A. 8, 1970).

pre-1948 floodgates for judicial improvisation *vis a vis* Section 2283. Contrary to the Board's assertions, the lower courts recognized that the decision in *Leiter* cannot be viewed in a vacuum. It must be viewed both in the context of this Court's earlier pronouncements in *Toucey* and *Richman Brothers* that Section 2283 represents a clear expostulation of congressional intent to preserve the integrity of state court proceedings as well as the pronouncement by Mr. Justice Black, in *Atlantic Coast Line* that "the exceptions [to the Statute] should not be enlarged by loose statutory construction."[24]

It is precisely this type of enlargement of the statute's exceptions, condemned by Mr. Justice Black, and inconsistent with *Toucey* and *Richman Brothers,* that would result if the Board's position is adopted. For the Board is not contending that the rationale of *Leiter* is exclusively applicable to the Board. Rather, the Board is predicating its position on its status as a United States Government administrative agency. Hence, any expansion of the "governmental exception" to include the Board, would, perforce include all other federal administrative agencies as well. Thus, all state court actions arguably related to the subject matter jurisdiction of any federal agency would be subject to similar interference to that here being attempted by the Board. No extensive exposition is needed to demonstrate the emasculation of the intent and purpose of Section 2283 which would result therefrom. It is the position of the National Chamber that, consistent with the above-described history of the statute, both Congressional and judicial, an exception of such far reaching consequence, if effected at all, should be effected only by Congress as the end product of its own consideration and debate and not by the courts in the absence of a clear congressional mandate.

The decision of the court below was soundly predicated on this principle, both in the instant case and in its 1956

24. 90 S. Ct. 1739, 1743 (1970).

decision in *N. L. R. B.* v. *Swift & Co.*,[25] upon which it based its instant decision.

In *Swift,* on facts markedly similar to those present herein, the Board sought an injunction in the federal district court to restrain the Company from enforcing a temporary restraining order obtained in the state court which, the Board claimed, enjoined peaceful picketing. Unable to fit its action into any of the statutorily expressed exceptions to Section 2283, the Board urged that as an agency of the United States it had acquired all the privileges and immunities of the United States and, therefore, it was not subject to the application of Section 2283. However, in disposing of this contention, the court, citing this Court's decision in *Reconstruction Finance Corporation* v. *J. G. Menihan Corp.*,[26] held that "the intention of Congress to bestow the privileges and immunities of the Government must be clearly demonstrated."[27]

The rationale utilized in *Swift* is equally applicable here. Here, as in *Swift,* the Board has not demonstrated that it was Congress' intent to exempt it from the application of Section 2283. In the absence of such a showing, the Board's contention that, as an administrative agency of the United States, it is privy to the "governmental exception" expressed in *Lieter* cannot be sustained.[28]

Moreover, the federal interests the Board is advancing herein are not those warranting an expansion of the *Leiter* doctrine. In *Leiter,* the Court held that the frustration of

25. 233 F. 2d 226 (C. A. 8, 1956).

26. 312 U. S. 81 (1941).

27. 233 F. 2d 226, 232 (1956).

28. This conclusion has found favor with Professor James Moore, who has written that "The principle excepting the United States from the bar of Section 2283 is inapplicable to governmental boards, agencies and corporations unless they can be properly equated to the sovereign." 1A. Moore, *Federal Practice,* 2314 (1965).

superior federal interests which would ensue from precluding the Federal Government from obtaining a stay of state court proceedings warranted an exception to the prohibitory statute. In its brief to this Court, the Board argues that not to include the Board under the umbrella of the "United States exception" would result in the kind of frustration of federal interests contemplated in *Leiter*.[29]

In essence, the Board's argument can be reduced to a contention that because Congress invested the Board with exclusive jurisdiction over the subject matter of the underlying dispute involved herein, the federal preemption in the area[30] renders the state court wholly without jurisdiction over the subject matter of the dispute and thus warranted the imposition of a federal injunction to stay any action taken by the state court in excess of its jurisdiction. The court below, noting that the Board had unsuccessfully raised this contention in similar prior cases[31] summarily disposed of its argument and reaffirmed the proposition that the expressed prohibition of Section 2283 could not be circumvented by application of the "preemption doctrine" even

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29. See Petitioner's brief at page 11.

30. *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959).

31. E.g., *N. L. R. B.* v. *Swift & Co.*, 233 F. 2d 226 (C. A. 8, 1956); and *Amalgamated Clothing Workers of America* v. *Richman Brothers*, 348 U. S. 511, 515-516 (1955), in which, on facts markedly similar to those here presented, the Board appeared as *amicus curiae*. In *Richman*, as in the instant case, no charges had been filed with the Board concerning the subject matter of the dispute between the company and the union. Apparently aware then that the absence of this jurisdictional prerequisite precluded the Board from participating as a full party in the *Richman* case, it participated as *amicus curiae* in the losing cause.

Since the statutory requirement that a charge be filed alleging the commission of specific unfair labor practices before the Board's jurisdiction is invoked exists now as it did then, one can only posit that the passage of sixteen years alone, and not Congressional action, has emboldened the Board *sua sponte* to seek to exempt itself from this requirement.

when the doctrine would otherwise be unarguably applicable.[32]

Moreover, it is submitted that notwithstanding the application of Section 2283 to the instant case, the preemption doctrine does not act as a jurisdictional bar to the action taken by the state court herein because the conduct of the union enjoined by the court was violent conduct—conduct over which, in the proper exercise of the state police power, the state court did, in fact, have jurisdiction.

In *San Diego Building Trades Council* v. *Garmon,* this Court established that "[W]hen an activity is arguably subject to Section 7 or Section 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted".[33] However, *Garmon* did not impose a total ban upon the jurisdiction of the states in the area of labor law. Rather, *Garmon* defined the scope of permissible state activity in light of the policies embodied in the federal legislation. In *Garmon,* this Court defined three broad exceptions to the general rule. Thus, the states retain jurisdiction where (1) the regulated conduct is "marked by violence and imminent threats to the public disorder"; (2) the conduct "touched interests deeply rooted in local feeling and responsibility"; and (3) where the conduct was of

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32. While acknowledging that the imposition by a state court into a federally preempted area itself presents "troublesome conflicts between Federal and state courts", nevertheless, the courts and Congress have determined that these conflicts are less egregious to the continued maintenance of harmonious federal-state court relations than are conflicts engendered by the destruction of the integrity of state court proceedings resultant from interference with those proceedings by federal courts. Thus, "[t]he mere fact that a state court invades a field preempted by Congress and is wholly without jurisdiction does not create an exception to Section 2283." 1A Moore, *Federal Practice,* 2324 (1965).

33. 359 U. S., at 245.

merely peripheral concern of the Labor Management Relations Act.[34]

In determining the applicability of the preemption doctrine to any given state action, the fundamental inquiry is whether the state legislative or judicial action conflicts with federal policy to a sufficient degree to warrant suppression of the state action on the authority of the supremacy clause.[35]

Therefore, while the *Garmon* rule admittedly carved out a defined segment from the broad continuum of activities over which the state and federal governments have concurrent power, it did not, however, eliminate the areas of such concurrent power.

Violent picketing and boycott activity, though an unfair labor practice and arguably subject to Section 7 or Section 8 of the Act, is an area which despite the preemptive limitations of the national labor policy is not beyond the jurisdiction of the state, acting pursuant to its police powers, to regulate.[36] A state court may, therefore, grant injunctive relief to prevent disturbance to the public order by violence, threats of violence, mass picketing, obstruction of streets or picketing of homes.[37]

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34. 359 U. S., 243-245.

35. *Swift & Co.* v. *Wickham*, 382 U. S. 111. 120 (1965); *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 241-42 (1959).

36. *United Auto., Aircraft & Agricultural Imp., Workers* v. *Wisconsin Employment Relations Board*, 351 U. S. 266 (1956); *International Union, United Automobile, Aircraft & Agricultural Implement Workers* v. *Anderson*, 351 U. S. 959 (1956).

37. *Mine Workers, District 50, Construction Workers* v. *Laburnum Construction Co.*, 347 U. S. 656 (1954). This principle is true to such an extent and the interests of the state in protecting the public from such violent activity is so manifest that this Court has recognized the jurisdiction of state courts to enjoin *peaceful picketing* solely on the ground of the existence of past violent conduct on the part of the picketing union. *Milk Wagon Drivers Union of Chicago* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287 (1940).

As described, the activity which the state court enjoined in the instant case was not peaceful picketing and, therefore, pursuant to valid statutory authority and consonantly with the state's police power, was within the described exception to the *Garmon* rule and properly within the jurisdiction of the court to enjoin.

Moreover, subsequent to the *Garmon* decision, this Court has continuously recognized the vital interests of the states in regulating the area of labor and have expanded the areas in which the states exercise jurisdiction concurrently with the Board. For example, as described, this court has recognized the power of the states to regulate violent conduct even when such conduct is also subject to regulation under the Act. Subsequent to *Garmon,* this Court extended the area of concurrent jurisdiction to include the power to enjoin non-violent tortious conduct.[38] Further, in the area of the enforcement of collective bargaining agreements, this Court has recognized the concurrent jurisdiction of state courts to litigate unfair labor practice disputes where the existence of an unfair labor practice is determinative of whether the collective bargaining agreement has been breached.[39] In addition, this Court has also recognized the power of the state courts over actions brought by union members alleging the union's failure to take a grievance through arbitration.[40]

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38. E.g., *Linn* v. *United Plant Guard Workers, Local 114*, 383 U. S. 53 (1966) in which the "peripheral concern" and "overriding state interest" exceptions delineated in *Garmon* were utilized to uphold the jurisdiction of the state courts in defamation actions, and *Taggart* v. *Weinacker's*, 397 U. S. 233 (1970), in which a state court finding that a union violated state trespass laws in its picketing of a shopping center was upheld.

39. See, *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S. 235 (1970).

40. *Vaca* v. *Sipes*, 386 U. S. 171 (1967). In *Vaca*, this Court rejected the union's argument that the conduct before the state court, if true, was arguably an unfair labor practice and, therefore, within the exclusive jurisdiction of the Board and held that, pursuant to *Garmon's* expressed exceptions, an area of concurrent jurisdiction existed.

Thus, the United States Supreme Court has repeatedly undertaken the delicate task of affording the states maximum autonomy in labor relations regulation while still maintaining the integrity of a uniform national labor policy.

However, even assuming *arguendo* the clear applicability of the preemption doctrine and contrary to the rationale enunciated in *Leiter,* the courts have conclusively decided that when a conflict arises between the Board's interest in maintaining a uniform system of enforcement of federal labor law under its jurisdiction and the preservation of the integrity of the state courts within the framework of our nation's federalist system, the Board's interest must be subserviated.[41]

Notwithstanding this determination by the courts, the Board is asserting that any action taken by the state courts in the area of labor law should be subject to review by the Board and if, according to the Board, the state action is contrary to that which the Board, although not having the facts before it, as in the instant case, thinks warranted, it should be able to enjoin such actions. Implicit in the Board's position in this regard is the notion that the state courts are unable to effectively interpret applicable federal labor laws and render decisions that are not in conflict therewith. However, despite the Board's lack of confidence in the state courts, neither Congress—as evidenced by the fact that the Anti-Injunction Statute has, in some form, been in effect for 178 years—the lower federal courts, nor

41. Moreover, this principle is not altered by this Court's recent decision in *Motor Coach Employees* v. *Lockridge,* ..... U. S. .....; 77 LRRM 2501 (1971) wherein the Court held that it is the underlying conduct giving rise to the court action and not the legal theory upon which the action is predicated that is critical in determining whether or not the preemption doctrine is applicable. In the instant case, it is the position of the National Chamber that even assuming *arguendo,* the otherwise clear applicability of the preemption doctrine pursuant to the *Garmon* as well as the *Lockridge* decisions, Section 2283 nevertheless serves as a bar to its application.

this Court have joined the Board in this lack of confidence. As expressed by this Court in *Richman Brothers,* and adhered to by the Eighth Circuit in *Swift:*

> ". . . the state courts have for many years adequately protected Federal rights, and . . . 'The prohibition of Section 2283 is but continuing evidence of confidence in the state courts, reinforced by a desire to avoid direct conflicts between state and federal courts.' "[42]

Further, while, as described, the conflicts that might arise between the Board's jurisdiction of federal labor laws and the state court's consideration of cases arguably within that jurisdiction are not sufficient to warrant the inapplicability of Section 2283 to the Board, an opposite conclusion to that rendered in *Leiter* would have created a conflict not simply between the federal and state courts, but also between the state court and the United States Government —a conflict that ultimately could have resulted in a multiplicity of subsequent actions in the federal courts. For, assuming the state court had rendered a decision in favor of Leiter (who sought to have itself declared owner of mineral rights under land owned by the United States), then the United States, who would have been bound by the state court's judgment in a suit in which it was not a party would, unless it wished to give up the land, have to file an action in federal courts to quiet its title. Assuming the federal courts held for the United States, in opposition to the state court ruling, the United States would have had to file a subsequent action to oust Leiter and return possession of the land and mineral rights to its lessees. It is postulated that a desire to avoid this state-federal conflict and resultant multiplicity of actions and the critical need for the Government to protect its proprietary interest in land it owned and was in danger of losing that established the predicate for the Court's holding in *Leiter* and

42. 233 F. 2d 226, 230.

its decision to except the United States as a party from the prohibition of Section 2283.[43] No such conflict or proprietary interest on the part of the Board is involved in the instant case rendering it within the *Leiter* rationale.

Therefore, neither Congressional history, judicial decision, application of the preemption doctrine, nor this Court's rationale in *Leiter* supports the Board's position herein.

CONCLUSION.

For the foregoing reasons, as well as for those urged by the Respondent, the National Chamber urges this Court to affirm the decision of the court below.

Respectfully submitted,

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43. Support for this interpretation of the meaning of the *Leiter* decision can be found in that decision itself. There, the Court stated, "the suit in the federal court was the only one that could finally determine the basic issue in the litigation. . . . The United States was not a party to the state suit and, under settled principles, title to land in possession of the United States under a claim of interest cannot be tried as against the United States by a suit against persons holding under the authority of the United States." 352 U. S., at 226.